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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 746

In the Matter of the Application of
MICHAEL M. SCHNEIDER
for a Writ of Habeas Corpus.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner Michael M. Schneider prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on December 11, 1952.

OPINION BELOW.

The judgment of the court below summarily dismissing a petition for habeas corpus, two judges dissenting, is unreported. It is printed in the record at page 12. No opinion was written.

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered on December 11, 1952 (R. 12). The jurisdiction of this court is invoked under 28 USC §1257.

The federal questions here raised were initially raised in an appeal from the judgment of the Municipal Court of San Francisco, the trial court, to the Appellate Department of the Superior Court of San Francisco. Complaint was made in that appeal that petitioner had been denied due process of law, a fair and impartial trial, and a proper jury trial.

The Appellate Department modified the decision of the Municipal Court as to punishment and affirmed the judgment as modified, without opinion. Under California law the Appellate Department of the Superior Court is the highest court to which appeal may be taken from the Municipal Court.

A petition for habeas corpus was thereupon filed with the District Court of Appeal of the State of California, First Appellate District, Division One. That petition alleged the same denial of constitutional rights as are contained in the petition to the Supreme

Court of California in the record before this court. The District Court of Appeal summarily denied the petition, without opinion (R. 3).

Petition for habeas corpus was then filed with the Supreme Court of California. It alleged that applications had been made to the lower courts, including the appeal to the Superior Court. It further alleged that by reason of an instruction given by the trial judge to the jury petitioner had been deprived of due process of law and trial by jury as secured by the federal Constitution. The Supreme Court of California summarily denied the petition without requiring the filing of any responsive pleading by the State. Two justices dissented (R. 12).

QUESTIONS PRESENTED.

(1) Whether California has denied petitioner an adequate review of petitioner's claim that he was denied rights protected by the federal Constitution in the criminal trial in which he was convicted.

(2) Whether there was a denial of procedural due process of law by an instruction by the trial judge to the effect that so long as all twelve of the jurors agreed that a violation of the statute had been committed, they need not agree what act in violation of the statute was committed by the defendant.

(3) Whether petitioner has been convicted and imprisoned for violation of a criminal statute which

as interpreted by the trial court in its instructions to the jury was so vague and indefinite as to be void.

(4) Whether by reason of the vagueness of the statute as interpreted by the trial court, petitioner has been denied notice of the charge against him, and an opportunity to present a defense.

(5) Whether petitioner was convicted by a court which was without jurisdiction because it acted under an unconstitutional statute.

(6) Whether there was a denial of trial by jury where the trial judge instructed the jury that so long as all of the jurors were agreed that there had been a violation of the criminal statute, they need not agree on what act had been committed by defendant; and if there was such a denial of jury trial, whether that constituted a denial of due process of law and equal protection, as guaranteed by the Fourteenth Amendment to the federal Constitution.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, infra, pp. i to iii.

STATEMENT OF THE CASE.

Petitioner and another were tried in the San Francisco Municipal Court for the crime of rioting. The judge instructed the jury by reading the statute, which provides as follows:

> "Sec. 404. 'Riot' defined. Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot."

The judge then instructed the jury further:

> "Section 404 of the Penal Code of the State of California, as I have read it to you, enumerates several different acts, the commission of any of which acts constitutes a violation thereof. So long as all twelve of you agree that a violation of the section was committed, I instruct you that you need not agree on which of the specifically enumerated acts was violated by the defendants or either of them." (R. 1-2)

In addition to those instructions, the trial court instructed the jury on the law relating to the crime of disturbance of the peace, which was said to be an included offense, and on the crimes of rout, battery, and unlawful assembly. He at no time stated what were the acts condemned by the statute on riot, nor stated whether rout, battery and unlawful assembly were included among those acts (R. 2).

Appeal was taken from petitioner's conviction to the Appellate Department of the Superior Court of San Francisco. Appellant there raised the issues of a denial of jury trial, of due process of law, and of a fair and impartial trial. This court, the lowest court of general jurisdiction in California, is the highest court to which an appeal may be taken from

the Municipal Court. The Appellate Department modified the sentence, and affirmed it as modified, without opinion.

Petitioner was thereupon imprisoned, and filed a petition for a writ of habeas corpus with the District Court of Appeal, alleging that it would be futile to file with the Superior Court since judges of that court had already passed on the questions of constitutional law involved in the case. The District Court of Appeal summarily denied the petition, without requiring any responsive pleading or evidence from the State, and without opinion (R. 3).

Petitioner then filed a petition for habeas corpus with the Supreme Court of California. The petition set forth in paragraphs II and III thereof (R. 1 to 3) the facts related above. The petition alleged violation of the right to a jury trial as guaranteed by the Constitutions of California and the United States, and of due process of law as guaranteed by both Constitutions, in that the jury had been allowed to convict without unanimity on the alleged criminal act committed by the defendant; it alleged that by reason of the instructions to the jury, the trial court was without jurisdiction of the offense; it alleged the appeal taken by petitioner and the raising of constitutional objections before the Appellate Division, Superior Court, and the District Court of Appeal, without securing redress.

The Supreme Court of California summarily denied the petition, two justices dissenting (R. 12), without requiring any responsive pleading from the State.

REASONS FOR GRANTING THE WRIT.

The reasons for granting the writ here sought are as follows: First, there is a serious question whether the State of California allows adequate review of denial of federal constitutional rights in the trial of criminal cases; second, the case raises the question whether a unanimous jury is within the concept of due process of law and equal protection of the laws protected against State invasion by the due process clause of the Fourteenth Amendment to the federal Constitution; third, the case raises the question whether that Amendment includes the right to notice of the exact nature of the charge, opportunity to present a defense thereto in a criminal case, and the right to a trial by a court with jurisdiction of the offense.

These are important questions of federal constitutional law, which can be settled by this court alone. Further, the proposition that a conviction may be had by a jury which is not unanimous as to the act for commission of which a defendant may be convicted and imprisoned, is a novel and dangerous proposition which must be authoritatively rejected if trial by jury is to remain a meaningful part of our criminal procedure.

ADEQUATE JUDICIAL REVIEW IN CALIFORNIA.

The petition for habeas corpus filed in the Supreme Court of California presented on its face a serious question of deprivation of constitutional rights pro-

tected by both the federal and state constitutions. The allegations not having been denied or controverted by any counter-pleading, must have been taken as true. *Hawk v. Olson,* 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61; *Lisbena v. California,* 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166; *White v. Ragen,* 324 U.S. 760, 65 S.Ct. 978. The summary dismissal of the petition in the face of its allegations must be vacated by this court unless it can be supported on valid and substantial non-federal grounds. *Dixon v. Duffy,* 342 U.S. 33, 72 S.Ct. 10, 96 L.Ed. 46; *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398.

The dismissal of the petition may have been on the ground that under California law no review beyond that allowed by the limited appeal to the Superior Court is available for one who complains of the deprivation of constitutional rights during the trial. If so, that decision is a violation of the due process of law guaranteed against state infringement by the Fourteenth Amendment to the federal Constitution. *Williams v. Kaiser,* supra; *Frank v. Mangum,* 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969.

But habeas corpus is allowed in such a case as this under California law. The leading case is *In re Bell,* 19 Cal. (2d) 488, where the court held that habeas corpus could be used to test the constitutionality of a local ordinance after a conviction had in a justice's court, and appeal to the Appellate Department of the Superior Court, the court of last resort by appeal. Regarding the use of habeas corpus, the court further remarked:

> "In California only a writ of habeas corpus enables a higher court to decide the question of constitutionality in cases which, like the present one, arise in a justice's or municipal court and can be appealed only to the superior court. * * *
>
> "Habeas corpus is also widely used to test the constitutionality not only of a statute but of the procedure in petitioner's trial, even though the trial court has jurisdiction to try the petitioner (See Ex parte Nielsen, 131 U.S. 176, 35 Col. L. Rev. 404 at 412) and any infringement of constitutional right during the trial may be raised on appeal. * * *
>
> "* * * Habeas corpus is not merely the proper remedy under such circumstances but the only one that will enable this court to decide upon the constitutionality of the ordinance."

It may be said that the California court saw no denial of constitutional rights in the facts alleged in the petition. One of the rights alleged to have been denied petitioner was the right to jury trial guaranteed by the Sixth Amendment to the United States Constitution. It has been held that this right does not effect the states. But the right to a jury trial is also guaranteed by the Constitution of California, and it has frequently been held that the right thus secured is the right to a common-law jury. Further, the right thus secured is a right to a unanimous verdict of the jury, as provided in California Penal Code, Secs. 1147, 1164, printed infra, Appendix A, p. iii. A right guaranteed and furnished to other persons accused of crime in the state may not be

denied to petitioner in this case without running afoul of the federal Constitution. *Frank v. Mangum,* supra, *Miller v. Texas,* 153 U.S. 535, 14 S.Ct. 874, 38 L.Ed. 812.

Or it may be argued that the California court upon the mere filing of the petition, without argument and without requiring any responsive pleading by the State, decided the constitutional questions involved on the basis of state law. But the questions included whether the criminal statute as construed by the trial court was so vague and indefinite as to be void; and whether if it was vague and void, petitioner had been accorded a sufficient notice of the charge against him, and an opportunity to prepare and present a defense; and whether under California law the trial court had jurisdiction, since under the doctrine of *In re Bell,* supra, an unconstitutional ordinance affords no basis for the trial court's jurisdiction. If all these questions were decided by the court without a full-scale inquiry into the case, then there arises the question whether the alleged right to review by habeas corpus is not in fact illusory in California.

If obtaining review by this method is a matter of satisfying such tortuous rules of pleading, or negativing the possibility of any other mode of review, or if granting or denying a hearing on the petition is a matter of such unbridled and capricous exercise of discretionary power that no petitioner can be sure he has satisfied the preconditions for review, then the right of habeas corpus is not really available to

him. Such a denial of review is as clearly a deprivation of federal right as a plain and open refusal to allow it. *Jennings v. Illinois,* 342 U.S. 104, 72 S.Ct. 123, 96 L.Ed. 119; *Marino v. Ragen,* 332 U.S. 561, 68 S.Ct. 240, 92 L.Ed. 170; *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398; Cf. *Dixon v. Duffy,* ..... U.S. ....., 97 L.Ed. Adv. 137.

Finally, on this branch of the case, it may be said that petitioner here relied on federal as well as state Constitutional rights. If in fact the statute was so construed by the trial court as to be too vague to afford adequate notice and opportunity to defend, a conviction here is banned by the due process clause of the Fourteenth Amendment. *Musser v. Utah,* 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562; *Cole v. Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644. And while the guarantee of jury trial in the Sixth Amendment is said not to extend to the states, when a jury trial is afforded according to the usage at common law, the right to a unanimous verdict is not so clearly outside the scope of the due process and equal protection clauses of the Fourteenth Amendment that it can be summarily said that that right is not federally protected. Indeed, the law of California recognizes the Sixth Amendment as the controlling California law, at least insofar as exclusion of minority groups from jury panels is concerned. *People v. Hines,* 12 Cal. (2d) 535.

The least that may be said, then, is that the reasons for dismissing the writ, if they do not depend ex-

clusively upon federal law, are so inextricably mixed with federal law that this court has jurisdiction to determine the matter. *Minnesota v. National Tea Co.,* 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920; *Smith v. O'Grady,* 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859.

DENIAL OF DUE PROCESS IN THE TRIAL.

The problem of denial of constitutional rights in the trial of petitioner revolves about certain instructions given by the court. These had to do with the crime charged, which was rioting. The instructions given included a reading of the penal code section, then the instruction quoted, supra, in the Statement of the Case. Other instructions regarding other crimes complicate the problem, raising a serious question of the construction of the statute, and the fairness of the trial.

There is first, the question whether the instruction, that the jurors need not agree on which of the enumerated acts was committed by the defendant, constitutes a denial of a jury trial. The exact meaning of this instruction is open to doubt.

The "enumerated acts" may have referred to the language of the statute, i.e., to "any use of force or violence," to "any threat to use such force or violence," if accompanied by immediate power of execution by two or more persons acting together. Under the instructions of the trial court, it undoubtedly also included "disturbing the public peace."

"Disturbing the peace" is a separate crime, defined in Sec. 415 of the California Penal Code (See Appendix A, infra, p. ii). The punishment for it is however only 90 days in the county jail or a fine of two hundred dollars, or both. The punishment for riot is one year in the county jail, or a fine of not exceeding two thousand dollars (California Penal Code, §405, Appendix A, infra, p. i. Although the section puts the maximum imprisonment at two years, it has been judicially determined in California that the maximum imprisonment in county jails is one year). Yet the judge instructed the jury that breach of the peace was an offense included in rioting.

This interpretation of the statute is at variance with all the rules of grammar and sound statutory construction. If the statute is construed to mean that disturbing the public peace is a separate mode of commission of the effense, there is no possible reason for the inclusion of the term "such" in the definition. That statute clearly means that the crime is committed by one who uses force or violence *which* disturbs the public peace, or threatens to use *such* force or violence—i.e., force or violence which will disturb the public peace. Unless this construction is adopted, the word "such" is pure surplusage, and obscures the meaning of the statute.

Furthermore, the interpretation adopted by the trial court is at variance with the decision of the highest appellate court in California which has passed on the question. In *Connell v. Clark,* 88 Cal. App. (2d) 941, the court rejected a contention that assault

and battery by two persons in a lonely place was a riot. See also *People v. Bundte,* 87 Cal. App. (2d) 735 at 743, 744, 746, where the court refers to Sec. 404 defining riot in terms identical with those contended for by petitioner here. Certainly petitioner did not defend at the trial on the theory that disturbance of the peace was an offense included in Sec. 404 of the Penal Code. It was not until the instructions to the jury were given at the close of the case that this ruling of law for the first time placed the question of disturbance of the peace in issue. This is important because under California law disturbance of the peace may be committed by shouting alone, if the shouting is accompanied by the necessary intent. *Ex parte Foley,* 62 Cal. 508.[1]

Under the judge's instructions, petitioner may have been convicted by a jury some of whom believed he had committed a disturbance of the public peace, some of whom believed that he had not disturbed the public peace but had used force or violence, and by others who believed that he had not used violence or disturbed the public peace, but had threatened to use violence. This is a violation of due process as guaranteed by the Fourteenth Amendment. *Cole v. Arkansas,* supra.

But the instructions did not cease at that point. The judge also instructed the jury on the statutory

[1]It was not alleged in the petition, but had the Supreme Court of California granted a hearing on the petition in this case, it would have discovered that the trial court instructed the jury to this effect.

crimes of rout, battery, and unlawful assemblage. Nowhere did he explain to the jury that these were not included in the various acts, commission of any one of which would constitute a violation of Sec. 404, defining riot. In view of the nature of these crimes, as to which the jury was instructed, there is grave doubt that the jury understood that they were not included in the crime of rioting.

Thus "unlawful assembly" is defined so as to include the doing of any lawful act in a violent, boisterous or tumultuous manner, by two or more persons assembled together. "Battery" is defined as any wilful and unlawful use of force or violence upon the person of another. It is punishable by a jail fine of not more than six months or a fine of not more than a thousand dollars, or both. "Rout" is defined as an assembly of two or more persons acting together, who make any attempt or advance toward the commission of an act which would be a riot if actually carried out. This is so vague and indefinite as to give no standard whatever to the jury. *Musser v. Utah,* supra. If it were the crime charged, it would surely be vulnerable to constitutional attack. Yet the jury might well have understood the instructions to refer to acts, the commission of any of which constituted the crime of rioting.

The possibilities of misunderstanding by the jury are thus enormously increased. Petitioner may have been convicted by a jury some of whom believed that he had committed the crime of battery, by others who

believed that he had not committed battery or any other crime but rout, by others who believed he had not committed any other crime but had committed the crime of unlawful assembly, by others who believed that he had committed no crime but the crime of disturbing the peace, by others who believed that he had committed riot by using violence and by still others who believed that he had committed riot only by threats of violence. Under instructions allowing this result the possibility of an acquittal was reduced almost to zero.

The failure of the court to adequately instruct the jury as to the crime with which petitioner was charged is a violation of the requirement that criminal statutes be definite and certain enough to provide a guide to what acts are prohibited. Cf. *Musser v. Utah,* supra, and *Cole v. Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644. In the latter case the trial was had upon the theory that petitioner had been charged with Sec. 2 of the statute. On appeal the conviction was affirmed as under Sec. 1 of the statute. This was held to be a conviction without trial and a violation of procedural due process as guaranteed against state invasion by the Fourteenth Amendment.

It has often been said that the right to a jury trial as guaranteed by the Sixth Amendment is not included within the due process of law protected against state invasion under the Fourteenth Amendment. It is well settled that states may abolish trial by jury. The question presented in this case, however, is a

variation of that problem. It is whether when a jury has been granted, the jury's vote must be unanimous in order to convict.

This question has not been passed upon by this court in cases involving state convictions, nor in any cases where the verdict of guilty might be said to have been reached without a unanimous jury verdict. It has been discussed, however, in cases involving a conviction of guilty by a jury which was unanimous and a recommendation of leniency where the jury was not unanimous. The principal case is *Andres v. United States,* 333 U.S. 740, 68 S.Ct. 880. In that case the court reversed a conviction in which the trial court had instructed the jury that they need not be unanimous in determining whether a recommendation of leniency should be given. The court reversed in spite of the fact that there had been a unanimous verdict on the question of guilt. The court said:

> "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." 68 S.Ct. at 884.

The question has arisen also in the cases involving a waiver of jury trial. See *Patton v. United States,* 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, where the court listed the essential elements of trial by jury at the common law. These were said to be first that

the jury should consist of twelve men, neither more nor less; second, that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and third, that the verdict should be unanimous.

That the right to trial by jury including the unanimous jury as secured in federal courts by the Sixth Amendment is the right as it existed at common law, see *Patton v. United States,* supra; *American Publishing Co. v. Fisher,* 166 U.S. 464, 17 S.Ct. 618, 41 L.Ed. 1079. It is precisely the same right which is guaranteed by the Constitution of the State of California. *People v. Howard,* 211 Cal. 322, 71 A.L.R. 1385; *People v. One 1941 Chevrolet Coupe,* 37 Cal. (2d) 283. See 25 S. Cal. Law R. 141; 100 Univ. Penna. Law R. 285-7. Where the rights secured by the fundamental law of two sovereign but related jurisdictions are derived from the same source, they must surely be the same rights. If the right tc a unanimous jury trial is not protected by the Fourteenth Amendment because the Sixth Amendment is not included in the Fourteenth, then at least it must be said that the denial of this right to a California citizen where it is part of the regular judicial process of California, is a denial of due process as guaranteed by the Fourteenth Amendment. *Frank v. Mangum,* supra.

The requirement of unanimity in cases similar to the case at bar has been recognized in California. See *People v. Howard,* supra, and *People v. Peete,*

54 Cal. App. 333. In *People v. Scofield,* 203 Cal. 703, the defendant was charged with failing to stop, give his name and address, and to perform the other acts required by California law after having been involved in an automobile accident. The jury found the defendant guilty of violating a section of the statute which required one who had been involved in an automobile accident to perform five different acts. The trial court failed to give an instruction that the members of the jury must agree upon at least one of the acts enumerated in the statute.

On appeal the Supreme Court of California held that failure to perform any of the five acts enumerated in the statute is punishable, but that a failure to perform any of the required acts is a separate offense. The court said:

> "Evidence sufficient to support one charge might be entirely unrelated to and insufficient to support another. The jury might not all agree on any one of the offenses, but might all agree that there had been a violation of some portions of the section. We think the situation here presented called for an instruction from the court on the point contended for by the defendant even though no such instruction was requested. It is difficult to lay down a rule which will fit all cases, but this much may be said, generally, that when a defendant is charged with separate and distinct offenses each requiring independent proof, the court should properly instruct the jury as to each offense even though instructions thereon be not requested by either party." 203 Cal. at 710.

This statement of the law was directly and completely violated by the instruction given in the case at bar.

The general rule for inclusion of a right secured by one of the first ten amendments in the due process clause or equal protection clause of the Fourteenth Amendment is well understood. The right involved must be so necessary to a concept of order and liberty that its denial would be inconsistent with our fundamental institutions. Cf. *Cole v. Arkansas,* supra, 333 U.S. 196, 92 L.Ed. 644; *Palko v. Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288.

Where a complaint is made to this court that there has been a denial by the state of due process of law in a criminal case, this court will look to all the proceedings in the state court and determine whether or not notice and fair hearing was given before a court of competent jurisdiction according to the established modes of procedure in that state. *Frank v. Mangum,* 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969. See *DeJeong v. Oregon,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158.

Here the consequences of the instructions given and the omission of instructions which should have been given are as follows:

(1) The petitioner was convicted by a jury which may not have been in agreement as to what act he had committed, for which he was to be imprisoned.

(2) He was convicted by a jury which was allowed to interpret for itself the scope of the statute under which petitioner was charged.

(3) As a consequence it was impossible for petitioner to know with the particularity required by law just what was the offense he was alleged to have committed. It was not until the jury was instructed that he knew that his defense should have included evidence negativing his commission of the crimes of battery, rout unlawful assembly and disturbance of the peace.

(4) Petitioner's conviction was obtained under a statute so vague as to be unconstitutional and void.

A trial and conviction involving these irregularities cannot be said to meet the standard of fairness inherent in the due process clause of the Fourteenth Amendment. Whether the Sixth Amendment's guarantee of a jury trial is included within the Fourteenth Amendment, therefore, the trial as a whole was so shockingly unfair that it violated the guarantees of the federal Constitution.

Allegations in a petition for habeas corpus addressed to the Supreme Court of the state which set forth the facts of such a trial and conviction should have produced an opportunity for review of that conviction by the state court. The decision of the state court summarily dismissing the petition constituted a fresh denial of rights secured by the federal Constitution. *Marino v. Ragen,* supra, *Jennings v. Illinois,* supra.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
April 20, 1953.

Respectfully submitted,
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Counsel for Petitioner.

GLADSTEIN, ANDERSEN & LEONARD,
Of Counsel.

(Appendix A Follows.)

Appendix A

STATUTES INVOLVED.

Penal Code of the State of California:

§404. **"Riot" defined.** Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law is a riot.

§405. **Riot, punishment of.** Every person who participates in any riot is punishable by imprisonment in the county jail not exceeding two years, or by fine not exceeding two thousand dollars, or both.

§406. **"Rout" defined.** Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

§407. **"Unlawful assembly" defined.** Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

§408. **Punishment of rout and unlawful assembly.** Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

§409. **Remaining present at place of riot, etc., after warning to disperse.** Every person remaining

present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

§415. **Disturbing the peace. [Horse-racing or shooting in unincorporated town: Profanity: Punishment.]** Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or my tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court.

§416. **Refusing to disperse upon lawful command.** If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

§1147. **Return of jury. [Polling: Discharge and retrial.]** When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried.

§1163. **Polling the jury. [Sending back for further deliberation.]** When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if anyone answer in the negative, the jury must be sent out for further deliberation.

§1164. **Recording the verdict. [Proceedings upon disagreement of jurors: Discharge of jury.]** When the verdict given is such as the court may receive, the clerk, or if there is no clerk, the judge or justice, must record it in full upon the minutes, and if requested by any party must read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes and the jury sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case.